IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. JANY LEVEILLE, SIRAJ IBN WAHHAJ, HUJRAH WAHHAJ, SUBHANAH WAHHAJ, and LUCAS MORTON, Defendants.	No. 1:18-CR-02945-WJ Pete V. Domenici U.S. Courthouse Cimarron Courtroom Albuquerque, New Mexico Thursday, February 9, 2023

TRANSCRIPT OF PROCEEDINGS
MOTION HEARING re: JOINT MOTION TO SUPPRESS EVIDENCE (Doc. 471) and MOTION FOR ORDER OF PRETRIAL CONFERENCE (Doc. 489)
BEFORE THE HONORABLE WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

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Proceedings reported by machine shorthand and transcript produced by computer-aided transcription.

I N D E X

USA v. LEVEILLE, et al. - 1:18-CR-02945-WJ

MOTION HEARING re: DOC. 471 AND DOC. 489

HEARING re: STANDING TO BRING MOTION(S) TO SUPPRESS

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(In Open Court at 9:40 A.M.)

THE COURT: Good morning.

MR. SHATTUCK: Your Honor, Joe Shattuck on behalf of Mr. Lucas Morton. Before we start, can we unhandcuff his right hand so he can take notes, since he represents himself?

THE COURT: Sure, that's fine.

We're in session today in the case of the United States vs. Jany Leveille, Siraj Ibn Wahhaj, Hujrah Wahhaj, Subhanah Wahhaj, and Lucas Morton, Case No. 18-CR-2945.

First, would the attorneys for the United States enter their appearances, please.

MR. HALL: Good morning, Your Honor. Tavo Hall on behalf of the United States alongside Kimberly Brawley, and then Travis Taylor from the Federal Bureau of Investigation.

THE COURT: And do we have counsel also appearing by either Zoom or phone?

MR. HALL: Yes, Your Honor. Thank you. Also appearing by telephone is Frank Russo from the National Security Division of the Department of Justice, and then I believe Mr. George Kraehe is also going to be calling in from the same National Security Division of the Department of

Justice.

THE COURT: All right. And then Mr. Morton represents himself pro se. Mr. Shattuck is here as standby counsel. I'll ask the other attorneys to enter their appearances at this time.

MR. ELSENHEIMER: Good morning, Your Honor. Aric Elsenheimer and Angelica Hall on behalf of Ms. Leveille.

MR. ROBERT: Good morning, Your Honor. Marc Robert and Tom Clark on behalf of Siraj Wahhaj.

MR. VILLA: Good morning, Your Honor. Ryan Villa and Justine Fox-Young on behalf of Subhanah Wahhaj, who is present and in custody.

MR. KOCHERSBERGER: And good morning, Your Honor. Don Kochersberger and Marshal Ray on behalf of Hujrah Wahhaj, who is also present and in custody of the Marshals Service.

THE COURT: Good morning.

The first matter on the docket this morning is Doc. 489, which is the United States' Motion for Pretrial Conference Pursuant to Section 2 of 18 U.S.C. APP III regarding the Classified Information Procedures Act. There was also a Motion to Designate a Classified Information Security Officer, or CISO. I've already granted that portion of the motion, and the CISO and alternate CISOs have already been designated.

So Mr. Hall, what's left from your perspective on the pretrial conference regarding CIPA?

MR. HALL: Your Honor, not that much is left. We also discussed this a little bit at the pretrial scheduling conference that we had back in, I think, October or November.

But just to make sure that it's clear, the goal here is -- to just make sure the Court is aware, there's a bucket of information related to an old investigation that has been closed since 2009 that we've looked at before and we did not think it was discoverable. But there was a request from one of the prior counsel for Siraj Wahhaj, which she is no longer on the case, so I think if the defense still wants that information, if they could clarify, that would help us.

But I think generally speaking, for the Court's information, we intend to take another look at that. We still don't see anything in there that's discoverable, but just to be safe. We intend to file a Section 4 motion to delete that from discovery, so the Court will be aware of the details regarding that information when we file that motion.

One other wrinkle related to classified information is the current investigation, the current case file, actually started in this case in Georgia before really any of the -- it was unrelated and before any of the kidnapping or anything like that took place. So any of the events that eventually had to transfer to New Mexico. But because of the nature of that investigation when it began, the information in the case file starts out as classified, or started out as classified. All of

the information that's discoverable has been declassified and provided to the defense from that.

That being said, to the extent that there are things, like in any case, that are not discoverable that haven't been turned over, they would be still technically classified, because they were not declassified and they were not going to be turned over. They would probably be mentioned in the Section 4 motion, as well, just so the Court is aware of that.

And then the last thing is, there is one final sort of loose thread that the United States has been trying to get to the end of recently. It stems from a post-arrest entry into the current case file and it does involve classified information. So there might be one or two or a handful of additional items of discovery that would come out of that that would start out as classified. Again, the intent would be to declassify all of it in terms of anything that's discoverable.

And then to the extent that there's something related to those -- you know, there might be a 302 or something that comes out of it. We don't know yet. We're still looking into it. But if that's the case, that would be described in the Section 4 brief, as well, in terms of the background, the parts that are not discoverable, and then the actual 302 or whatever it is that would be turned over in a declassified format.

So the bottom line is, we don't think there's going to be any classified discovery, and we don't think there's a

need for security clearances for defense counsel, but we do intend to file a Section 4 brief or motion. I think right now, the scheduling order has it set with a deadline in April, and at this point there's no reason to think that we can't satisfy that.

THE COURT: So as I understand it, there's going to be an initial effort to determine, regarding I guess requested discovery information, whether it can be declassified, and if it's declassified, it totally takes it out of the realm of CIPA, correct?

MR. HALL: Yes, Your Honor, unless there's some argument to be made that -- you know, when it's declassified, things get redacted. A lot of times it's unrelated, it's irrelevant. But if there's a fight about what's underneath those redactions, then maybe we'd have to go into it more. But otherwise, you're right, it should just be regular discovery.

THE COURT: Now, isn't the standard for -- if the Government objects to CIPA information, the standard is the information has to be relevant and helpful to the defense?

MR. HALL: Yes, Your Honor. Relevant and helpful, which comes from the Yunis case, and then all the CIPA cases that go from Yunis.

THE COURT: Now, based on your experience dealing with CIPA material, at that point is there typically an in camera review that's done, and that's under the -- is it the

Section 4 motion?

MR. HALL: Yes, Your Honor. So when we file the Section 4, depending on the nature of the items, it can go one of two ways. It could just be a very obvious set of documents that are of a category that we can describe to the Court in the Section 4, and then it would be up to the Court to decide whether it wants to actually look at any of the document. But in a case where there's thousands and thousands of documents, it might be more efficient to not look at every single one.

But if there are documents that are kind of closer on the call, or if we're looking for a substitution rather than just a deletion, where the Court needs to approve what it is that's being substituted out, there would be an in camera review by the Court ex parte, and there could even be an ex parte conference if we needed to talk about it.

THE COURT: Right, I saw that in the case law, and also your motion.

Now, in terms of -- some of the initial discovery has already been declassified.

MR. HALL: Yes, Your Honor.

THE COURT: I take it if we get into where we're dealing with classified information, we're not talking about thousands and thousands of documents?

MR. HALL: No, Your Honor. I think the -- so the 2003 to 2009 bucket is somewhere around 180, maybe 200

documents.

THE COURT: So it's a very manageable volume?

MR. HALL: Very manageable, yes, Your Honor.

THE COURT: Okay. And then the other thing is, from my review of your motion and some of the statute, itself, and some of the case law, typically the CIPA conferences, you know, establish timing of discovery requests, timing of the United States' motion under Section 4, timing of pretrial notice under Section 5, timing of the Section 6 hearing. Do we need to set any dates now, or are certain dates already set?

MR. HALL: So I think the April date that's set -- and the way it's phrased in the scheduling order is substantially complete -- we imagine that as being the Section 4 filing on our part. There shouldn't be any Section 5 or Section 6 if there's no classified information being provided to defense counsel, so we don't need dates for those.

THE COURT: So to the extent we need any dates right now, it's already set?

MR. HALL: I think so. And if there's a need to go beyond that date, we will certainly let the Court know as soon as possible and we'll go from there. But at this point, we should be good.

THE COURT: Okay. At this point, do any of the defense counsel wish to respond?

MR. ROBERT: Thank you, Your Honor. Marc Robert on

behalf of Siraj Wahhaj.

The problem, of course, in this kind of a situation is that we don't know what we don't know. We are generally aware that there was an investigation, I believe, of Siraj Wahhaj started in 2003, ending in 2009. Whether or not that investigation had anything to do with the things that developed into this case are things that we don't know.

Counsel mentioned that there were things that were going on in Georgia that generated classified information. Again, we don't know whether the information that was obtained during those processes informed the investigation or the prosecution that we're now dealing with. Without knowing those things, it's impossible for me, at least, to say to you that, yes, we know that there are things in there that we need to look at or at least have you look at, or no, there aren't.

The problem, I think, with timing is, here we are in early February, and April is a couple of months from now and five months before the scheduled trial date. I'm concerned that if we end up with a bunch of classified information, or disputes about whether it's relevant and helpful, that we could end up in a timing crunch with respect to the trial date. I guess --

THE COURT: I mean, the concerns you've raised are legitimate from your standpoint, but the statute and the provision, they are what they are. The U.S. Supreme Court --

the constitutionality of the statutes, to my knowledge, it's been challenged, but I think it's been upheld. I mean, I guess I'm encouraged that there may not be any if it's declassified.

MR. ROBERT: Yes, that would be great.

THE COURT: That's a win-win for everybody. If there's something that comes in pursuant to Section 4, that's one of those statutes -- I mean, as you know, you and I have had discussions in terms of your former job where the Criminal Justice Act allows defense counsel to bring ex parte matters that I've never really -- I thought it sometimes put the Judge in a difficult position. That's why the CJA managing attorney, I was like, yes, that really helps. But this is a statute where it allows the Government to submit an ex parte, and even though I'm not a big fan of those kind of ex parte hearings, again, the language is what it is.

And even if there are certain limited areas where when you're dealing with classified information it would allow an interlocutory appeal, which would really -- I mean, I don't see that happening, because honestly, we're not talking about a large volume. I don't mean to minimize the concerns you raise, but I don't know how to deal with it other than just moving forward based, at this point, on there may be a Section 4 motion, there may not. If there is no classified information, then the whole thing is moot.

MR. ROBERT: Right, Your Honor. I just wanted to let

you know that those are concerns that I have.

THE COURT: And they're valid concerns, and I appreciate that.

MR. ROBERT: Thank you.

THE COURT: Mr. Villa.

MR. VILLA: Thank you, Judge.

I think it's important to point out that the Government started this case saying there's classified information, we're going to have to invoke CIPA and go through the CIPA process. This was in their motion to declare the case complex filed way back in the beginning of the case, Doc. 47. The Government has sort of backtracked, in my view, since then. They have declassified a small number of materials, which I basically have here, Judge, and it's clear from that information that there are things missing. And the Government has taken the position today, and in their motion, essentially that the stuff that's still classified isn't relevant and helpful.

So first, relevant and helpful is not the same as the Brady standard. There's a lower threshold for the Court to determine whether something is relevant and helpful. But by their own admission, there's at least two buckets of evidence that's likely relevant and helpful.

The Georgia investigation, why is that relevant and helpful, Judge? Because the FBI was surveilling some of the

Defendants in Georgia for suspicions of terrorist activity. The Government has produced some of those surveillance reports, pole camera footage and things along those lines, that showed no such activity. So exculpatory on its face. And the Government took the position, and still takes the position, that that stuff is not even relevant, even though it's clearly exculpatory.

I mean, if these Defendants are terrorists, or supporting terrorists, or were planning some terrorist activity in the months before they allegedly moved from Georgia to Taos, yet nothing has been seen by these FBI investigators, that stuff is very relevant. And what's in that Georgia investigation that's classified we believe is everything that led up to why they were surveilling the Defendants. Why were they putting up pole cameras? Why were they watching them, their travel patterns? Why were they doing all that? We have none of the why. We have no information in any of that material.

So our fear is that the Government is saying, well, there's nothing here, and they don't think that's exculpatory when it clearly is. And I think something that was post-arrest has to be relevant in some way. I mean, I don't know what it is, but if it's post-arrest, we're talking August 2018. We're almost four and a half years later and the Government is saying it's still in the process of declassification, which is what

they said was happening back in 2018 when they filed their motion to declare the case complex. They said, we're going through the process.

I think there's a way, another approach that the Court ought to consider, and that is this. I don't know about the 2009 info. I mean, that might be something that's more of a Section 4 issue, right, where the Court has to look at the Government's submission, look at the defense's submission, which we are entitled to provide to you sort of our defense theories so you can determine what's relevant and helpful. That might be something that the 2009 information is right for. You see the Government's submission, you see what the defense submits, and you make a call, because the Georgia investigation and the post-arrest information is clearly relevant.

And I think there's another way around it rather than waiting until the end of April for the Government to do their Section 4 and the defense to submit their, you know, information to you, to help you decipher whether the stuff is relevant and helpful. You know, we've got a CISO, you've got defense counsel that can get cleared. I've been cleared. I was cleared in the Mascheroni case back in 2010. Since then, I've picked up no new criminal charges, thank goodness, so I think I could get another clearance. So, you know, I don't mean you have to clear everybody, right, but for instance, if I got a clearance and maybe one other, we could get a SCIF and we

could put that information in there right now to let us review it. Rather than waiting until the end of April to argue whether it's relevant and helpful, we can deal with Section 5 and Section 6 to determine if we even care about that information. I mean, we might look at it and say, nah, this doesn't matter, and that's the end of it. So instead of delay, we do that as sort of a hybrid approach, right, with those two buckets of information.

Clearly, I mean, we can brief this, Your Honor, but you can read these reports and they talk about pole camera surveillance of the Defendants in Georgia, and there's nothing there. And you and I both know that the first report is not, "I saw Defendant So-and-So doing such-and-such at their home in Georgia." The first report is before that, right. This is why we want a pole camera, and this is why we're interested in these folks. That's what's in the Georgia investigation. And if that's material the Government doesn't want to use, then it's not necessarily something that the jury would hear, but it might be exculpatory, just like the surveillance and pole cameras are exculpatory, because these are just people living their lives, they're not doing anything wrong.

This is an extraordinary case. If we were in 2018, you might say, okay, we'll go along with what Mr. Hall has suggested. But we're four and a half years later. There are speedy trial concerns. We're trying to meet this September

trial date. It's not -- there's no harm done to national security interests by having cleared counsel review documents in a SCIF and going through that process. And like I said, we might decide we don't need this, or it's not worth the risk of an interlocutory appeal. But it would certainly be much more efficient and much faster than waiting until the end of April just so you can make that threshold determination about, should we even have a SCIF, when we know by the Government's own admission that at least two of the buckets are clearly related to these Defendants in this case.

THE COURT: I had forgotten that you were in the Mascheroni case.

MR. VILLA: I try to forget, too, Judge.

THE COURT: A challenging client.

MR. VILLA: Yes, he was.

THE COURT: Are those backgrounds -- they're good for five years, right?

MR. VILLA: You know, that's a good question. It was a DOE clearance, not a DOD clearance, so it would probably -- I mean, it's the same folks doing the clearance, I guess, the FBI. I think it was good for ten years, which has lapsed, right, but I do think re-application is much faster than an initial application. And like I said, I've just been sitting at home and staying out of trouble, so hopefully my re-application will be a little faster than my initial

application.

THE COURT: Let me -- is the CISO on the phone?

MR. HALL: I don't believe so, Your Honor, no.

THE COURT: In terms of a background investigation to clear, or to get -- I mean, it may not come to pass in this case, but certainly this isn't the only case I've got on my docket right now involving classified information. Have any -- no defense counsel in this case yet has gone through either an updated background investigation or an investigation that's required, right?

MR. VILLA: Certainly not for this case, and I don't think so with respect to any other cases. So we would have to get the ball rolling, and that's another concern. If you decide that Georgia and the post-arrest conduct is something that we're at least entitled to review in the SCIF, if you don't make that decision until the end of April, we're starting the process then, and even a re-application is going to take, you know, some time.

So that's why I make this other suggestion, is we get the ball rolling now. I'm willing to be at least one of the folks to go through it right now and sit in the SCIF and look at that. I think that could short-circuit some things and certainly change the speedy trial analysis if we're talking about interlocutory appeals or delaying the September trial date.

THE COURT: Sure. Can you confer with your colleagues and then file a motion requesting the background investigation?

MR. VILLA: Yes. I do think the Court would probably have to order that. I think all of my colleagues will agree, but we can file something for the record, and then if the Court would issue an order that a background needs to start on me now, I think that would save a lot of time.

THE COURT: Okay. I may get the United States to respond, but do it in a short notice setting.

MR. VILLA: Thank you, Judge.

MR. HALL: Your Honor, if I may, to perhaps save everyone some time, hopefully, for one thing, I'd point out all of the Georgia investigation was classified, and all of it has been turned over declassified. There is no more classified discovery in the Georgia investigation. The reason I mention it is because the thing is -- just think of it as a normal case, not classified. The Government turns over everything that's discoverable, it doesn't turn over the handful of things that aren't discoverable.

I only raise that to say, the things that weren't discoverable that aren't turned over, they remain classified just because of the nature of the case. But if there was something in there that was discoverable, it's going to be declassified and turned over. So there is nothing left from

the Georgia investigation to turn over that would be classified. So that's number one.

Number two, there is no -- so the argument that if a defense counsel has a clearance, they can look at the classified discovery documents and then decide, that's like the oldest argument in the CIPA book and it's been denied by every Circuit that's ever looked at it. That's not how it works. It's almost irrelevant. Whether they have a clearance or not doesn't change the process under Section 4.

Again, we do not anticipate anything that's going to be classified to be discovered. It might be discoverable, and that would only be those little, like maybe two or three things that we are currently trying to get to the end of in this current case.

The 2003-2009 case from New York, nothing discoverable there. What we are going to show the Court in our Section 4 motion is, this is what's here, none of it has really been helpful, so clearances are irrelevant in that case because there's nothing to turn over. It's the same with the Georgia investigation. That's actually already been done. We've already provided everything discoverable there in a declassified format.

And then like I said, with those last couple of things that may be coming, they may start as classified because it's a part of this investigation, but they will be

declassified and then provided, if it's discoverable. And if it's not, the Court will see it and know about it in our Section 4 motion describing and showing what it is. So I don't think we need to do the briefing and to start the clearance process at this point, because there's just no -- it would be a waste of everyone's time.

THE COURT: What's your response to that, Mr. Villa? If everything in the Georgia file has been declassified, then to the extent that -- I guess if there's any issues you have to complain about, it's to the extent something has been redacted.

MR. VILLA: Well, I mean, what I heard Mr. Hall say is that everything that's discoverable has been declassified. So the Government is getting to decide what's discoverable. And the Government is also taking the position that none of this surveillance that took place in Georgia is discoverable, and we clearly think it's exculpatory, so we disagree.

THE COURT: Right, but CIPA -- in other words, if they made their assessment under Brady and made those disclosures, CIPA doesn't change the Government's obligation under Brady. It doesn't expand it. So if they represent that they have fulfilled their obligations under Brady, how is that different than any other case?

MR. VILLA: Well, because if there's classified material that's relevant and helpful, which is a lower standard than Brady, then the Court is entitled to decide whether a

cleared attorney gets to look at it. And so if the Government is taking the position that there's nothing here to see, no big deal, the stuff that's discoverable has been declassified, everything else stayed classified, it's not discoverable, trust us, that's what Section 4 is about, right. And so I think, then, the Court could still have me cleared. Maybe it is a waste of time just to have me cleared, but it could then expedite the Section 4 process. So rather than the Government submitting their Section 4 submissions at the end of April, you know, give them two weeks to do it, or three weeks, whatever they need, on Georgia and the post-arrest stuff.

And then what CIPA also allows for, Your Honor, is we can have a conference with you, the defense can, ex parte. I mean, it could be brief, but it could also be in person, where we just tell you, hey, Judge, these are our defense theories, and this is what we think is in there that's relevant and helpful to us. So you've got the Government's submissions in a few weeks, you sit down with us and we tell you what we want you to look at, you look at that and you decide, yeah, this needs to go in the SCIF and let cleared counsel look at it, or you decide we don't. But I think that process needs to happen a lot faster than the end of April.

And the Court's scheduling order says substantially complete by the end of April, and Section 4 could just be the beginning, because you could decide we're entitled to look at

these things in the SCIF, and then we've got to do Section 5 and Section 6. That part ought to get done closer to the end of April, or as soon as practicable under the circumstances.

THE COURT: Well, I'm reluctant to move that April date, because in this case, your co-counsel, Mr. Elsenheimer, is going to be in front of me on a complex case that's going to trial in April, and I've got to schedule a lot of the pretrial motions. So even if we were to move the dates up to what you're talking about, I can't get to it.

MR. VILLA: No, I understand that, Your Honor, and I think what I'm suggesting is if you could do the initial Section 4 part before the end of April, that might save a lot of folks some time.

THE COURT: What's the initial -- what part are you talking about?

MR. VILLA: So the Government files their Section 4 submission to you and says, here's the classified material that we don't think is discoverable, and then we sit down with you and say, here's our defense theory, here's what we think might be in there that's relevant and helpful, and you make that initial determination about whether they should have to disclose it or not, because the next parts of CIPA come after that, and so the Court's deadline is to finish all of CIPA by the end of April.

Now, I understand trials and things like that might

get in our way, but if we move that up a little bit more, in the event that there is discoverable information -- and like I said, I take issue with the Government's representation that the stuff that's still classified from Georgia is not discoverable when we know there's material that led to surveillance. You don't just start with surveillance. So there's clearly classified information that led to these guys doing surveillance, and the question is, what is in there? And whether that's exculpatory, whether that's consistent with what the surveillance showed, which is zero terrorist activity, is very relevant to the question of whether these folks left Georgia to come to New Mexico to provide material support to terrorists, as they have been accused of. What they were doing in the months and weeks before that is very relevant, and that's what we think is in there.

THE COURT: All right. Well, here's what I'll do. To the extent that the Government can get its Section 4 motion before the April deadline, I'll go ahead and ask you to do that. But I'm not going to bump that deadline, because it's just not practical, if for no other reason than based on what I've got set.

MR. VILLA: Yes, and I think -- Judge, I understand. I understand your schedule. I think what we would ask that the Court order the Government to do with that submission is, you know, we're looking for the precipatory material, what led up

to the installation of the pole camera, what led up to the FBI surveillance of these folks for a very long period of time. That's the information that the Government ought to be describing, in addition to whatever's in this post-arrest material and the 2009 information.

But I think that we're very concerned that the Georgia stuff that's classified is exculpatory, and while we respect the Government saying they've conducted their Brady obligation, we don't necessarily -- they can't be in our shoes, right. They don't know what our strategy is. They don't know what our theory is. And they've told us over and over, we don't think the surveillance and the pole cameras are relevant at all, because it doesn't show anything, but that is very relevant. You know, terrorists don't sit around living their lives, doing normal family things like these folks were doing. So to the extent that the pole cameras show they weren't doing those things, it's very exculpatory.

So I think that's -- to the extent the Court can order the Government to expedite that process, we'd ask it to. If it happens that whenever they submit that, you're in trial and you can't sit down with the defense, that's okay, we understand that. But sometimes trials get moved or bumped. And the ex parte conference that I'm talking about, that the defense would have with you, should happen before you rule on the Section 4 motion.

So the Government submits their motion, we sit down and tell you, Judge, this is what you should look for, this is what our defense theories and strategies are, and then you make a ruling. So to the extent that can happen faster, that's what we're asking for. If it turns out you're in this big trial and we've got to do it after April, we'll live that.

THE COURT: Fair enough. So again, with the ultimate goal that we're going to adhere to the September trial date, to the extent that the Section 4 filing can occur before the April deadline, I'll request that the Government strive to do that.

MR. HALL: Yes, Your Honor, we will strive to do that. And the other thing to note here is, we don't have to do all of this in the CIPA context. So if there's something that the defense believes has not been turned over, they can ask for it and we can look for it, just like any other situation. And if we find, oh, there is something that they're mentioning that we somehow missed, we can declassify it and turn it over without doing any CIPA stuff at all.

And regarding the surveillance video and all that, I think there's a misunderstanding, because we have turned all of that over. We do think that some of the surveillance video and that stuff isn't actually discoverable, but as we normally do when there's a close call, or when the defense has asked for it, we have turned all of it over. So there isn't any more to turn over.

THE COURT: Of the surveillance?

MR. HALL: Of the surveillance stuff, nor anything preceding that. I'll go back and check, but I know that the things that led up to the surveillance have also been turned over, declassified and turned over.

But I do believe that the parties can handle this in a normal discovery fashion, even with a Motion to Compel on the unclassified side, because like I said, everything in that Georgia case that's been turned over has been declassified. There's no reason that the rest of it couldn't be, if there's anything, which, again, there really isn't.

Relevant and helpful is actually not lower than Brady. Brady is a lower standard. So if we've done our Brady review, we've already covered the relevant and helpful stuff, as well.

THE COURT: Well, that's interesting. File a Motion to Compel. I mean, if it's not classified, you don't even need to get -- CIPA is irrelevant if it's not classified.

MR. VILLA: Certainly, Judge. If they say, we've got this stuff and we'll declassify it, or it's already declassified and we'll give it to you, that's fine. But, you know, the FBI does not just show up --

THE COURT: I get what you're saying.

MR. VILLA: -- to do counterterrorism surveillance, you know, out of the blue. There's got to be more there. And

if the Government tells us they can give us that and we don't have to go through CIPA, great. But we know from the Government's representations there's post-arrest information, there's other stuff, and so we want to just get this process going.

THE COURT: If he files a Motion to Compel, again, assuming nothing is classified, then you would respond, as you said, in the normal context, like any other criminal case. If you determine there is something there and it's classified, then that kicks in CIPA.

MR. HALL: If they file a Motion to Compel and actually identify something, and we agree that we should turn it over and for some reason we haven't yet, which I don't think is the case, but if that were to be the case, we would just move to -- in the Government's side, we would just declassify whatever it is that's been identified and asked for, and we'd turn it over.

If we think that -- there are reasons why we wouldn't turn something over. If it's classified and if there's some equity there and it's not discoverable, we would stand on the not discoverable portion and that would kick in the Section 4. But it doesn't even have to get to that point if we can just declassify it and turn it over. Or if it doesn't exist, or we've already turned it over, in which case we can just respond, it's already been turned over or it doesn't exist, and

then we're done.

THE COURT: All right.

MR. VILLA: Your Honor, I totally understand. I guess the last thing I'll say is, the concern is that the Government has represented that there's post-arrest information that's classified and going through the declassification process. Well, post-arrest was almost five years ago, so we're concerned about delay. If that's going through the declassification process, you know, with respect to issues related to speedy trial, the Government needs to decide now, are they going to declassify it. And if not, put it in their Section 4 submission.

THE COURT: All right. Is there anything else on this?

MR. SHATTUCK: May I speak for Mr. Morton --

THE COURT: Sure.

MR. SHATTUCK: -- understanding the change in our status?

THE COURT: Absolutely.

MR. SHATTUCK: It's a little premature, but we're going to have to consider this. If there's an issue where there's a SCIF, because Mr. Morton represents himself, we're going to have to consider how he gets in there.

THE COURT: Well, my thought on that is, that's one of the roles of standby counsel.

MR. SHATTUCK: No, I understand that. But since he's representing himself, me looking at it doesn't help him. So we need to set up a way where both of us can go in --

THE COURT: There's no way he's going to get a security clearance.

MR. SHATTUCK: Oh, absolutely not. I think in the Mascheroni case, he was allowed -- that defendant was allowed to enter the SCIF. But I just wanted to bring it up now so we can deal with it when the time comes. It's clearly premature, but when it comes up, we're going to have to deal with it.

THE COURT: Okay, if we get there.

MR. SHATTUCK: Yes, sir.

THE COURT: You're right. That's one of the things that occurred to me.

All right, anything else on this?

MR. HALL: Not unless you have any questions.

THE COURT: No. All right, so let's shift gears and go to the next matter. That's regarding a Motion to Suppress.

When I started reviewing the various submissions made by the parties and looking at the governing law by the United States Supreme Court and Tenth Circuit precedent, you've got Tenth Circuit cases out there. You've got U.S. Supreme Court case Rakas v. Illinois, 439 U.S. 128. United States v. Rascon, 922 F.2nd 584, a 1990 Tenth Circuit case. You've got United States v. Soto, 988 F.2nd 1548, a 1993 Tenth Circuit case.

That stands for the proposition that the proponent of a Motion to Suppress bears the burden of demonstrating his or her standing to challenge the search.

And you've got -- this is a quote from Smith v. Maryland, a U.S. Supreme Court case, 442 U.S. 735. It says: "Standing is analyzed based on two factors, whether the individual by his or her conduct has exhibited an actual or subjective expectation of privacy" -- that's given, in my view here. But then the other factor is: "And, whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable."

Now, the Defendants' Motion to Suppress, I believe it's Doc. 471, didn't address standing at all, but oftentimes in suppression cases, standing is assumed or standing isn't contested. The United States filed its response, I believe it's Doc. 566, and the Government raised the challenge to standing, and then the Defendant replied.

So with that kind of background, I think I'll hear from defense counsel first. So whoever is going to go first on this may respond.

MR. ROBERT: Thank you, Your Honor. Marc Robert for Siraj Wahhaj and also for remaining Defendants who joined the motion and may have some things to say, as well.

Your Honor, the first thing that I would say is that the second question -- I agree with you, the first question

seems to be without question. Whether something is a thing that society is prepared to accept as reasonable strikes me as being an evidence-driven thing, and we think testimony is probably required in order to establish that, given the circumstances of this situation, not the least of which is the fact that although it's undisputed, I think, that the compound, the home for these Defendants and their families, was built on the wrong parcel, which is not strictly contiguous with Mr. Badger's -- Mr. Morton's parcel, but it was similar in size, similar in character, and very close geographically.

The fact of the matter is, and this is even reflected pretty clearly in the affidavit that's the subject of the Franks motion, and it's Bates 23617 for those scoring at home, the affiant says that there was clearly a discussion between or among the Badgers and the Defendants and their family members about the mistake and what to do about it. So for a time, a substantial amount of time, there was essentially an agreement between the parties to try to work things out. For example, maybe we just swap titles. We give you what we now know is ours, and you'll give us what was then yours. It seemed to be a reasonable solution. It didn't happen for whatever reason.

Eventually what did happen, after law enforcement contacted the Badgers in May of 2018, is there seemed to be a change in attitude by the Badgers, to the point of which an action was apparently filed in state court, an objection of

some sort, which was dismissed on June 27th. And as far as we know, there's been nothing further beyond that.

The fact that there was apparently a collegial relationship among the parties to discuss how to manage this issue is something that I think society would look at and say, yeah, of course. The Defendants' home was built on this piece of property. They lived on that piece of property in their home for a number of months, and then law enforcement got involved and the Badgers' attitude changed. But the fact remains that there was an agreement that allowed them to remain on the property for a fairly long period of time. There was never a judicial finding that they should be ejected or removed. And that, I think, provides, under New Mexico law, a due process interest in the Defendants and their family members to stay on the property until such time as due process has told them they must leave.

So I think that in order for you to make a proper determination about standing, you kind of need to know what the ins and outs of those -- what the evolution of those relationships was.

THE COURT: Well, who do you want to call as witnesses?

MR. ROBERT: I would say Mr. Badger, certainly. I'd like to know what interactions there were between the Badgers and law enforcement, as to what were the Badgers told and what

generated the change in the Badgers' attitude about their willingness to allow Mr. Morton, Mr. Wahhaj, and the rest to remain on that property. And I think that informs, significantly, whether or not there is a reasonable expectation of privacy that society would recognize as such.

And it seems clear to me. I mean, it is their home, and that's a significant word in this context, obviously. The case law makes it so. And there's no question that that's where they were living for months, from, I guess, December on through August when they were arrested, and apparently the place has been bulldozed. But it seems to me clear that standing exists because of those facts, even as they're related by the affiant in the affidavit that was submitted to Judge Backus.

But if there's a question about that, if we're not sure whether that relationship as it evolved over time and as it ended, at least at the time at which the arrest was made on the 3rd of August 2018, then we need to hear evidence about what transpired over that period of time and whether or not that vitiated the expectation of privacy that I think everybody would have recognized up until the point at least at which the Badgers said, no, we're not doing this anymore. We don't know enough about how that happened in order to make that determination.

I do think, from my own perspective and I think from

the rest of the defense perspective, that the fact that those things had occurred, had been allowed to evolve from the time at which the Defendants and their families moved into their home on the wrong piece of property, to the time at which the Badgers said, no more --

THE COURT: As I understand it, this was vacant land when they moved onto it, and they then erected some kind of a structure.

MR. ROBERT: Yes, that's right. And that structure became their home, and was their home for months and months until they were evicted, basically, by the warrant and the arrests and all that happened after August 3rd.

And again, to my mind, there's not really much question about standing. It seems like those facts, just as they stand, would support a finding, your finding, that standing exists. If there's a question about that, though, and we've discussed this, I think that there's a need to hear more about the ins and outs of what happened over the course of those months between December of 2017 and August 3rd of 2018.

THE COURT: There is a case, I think the Government may have cited, and it's a Tenth Circuit case -- I'm drawing a blank on the name of it. But it was a -- I guess it was on BLM land. A gentleman kind of made his home in a cave on BLM land.

MR. ROBERT: Yes, Your Honor.

THE COURT: I think it was determined ultimately that

that defendant didn't have standing. And I was thinking, well, somebody who's homeless here in Albuquerque, they can put up, like, a tent along the street or on somebody's property, be it Government or personal property, and that may be their home in their mind, but is there a reasonable expectation of privacy there? If the authorities came to clear the tent -- just like that park right there at the Big I. Ultimately the City made a determination, we're going to clear the park. I mean, if someone felt that the tent that they had erected on there was their home, they may have a subjective expectation of privacy, but I don't think it would be a reasonable expectation of privacy.

And then certainly Mr. Badger, it's his property. He signed the consent, which certainly he's -- to allow the search. Anyway, those are the issues that come to my mind.

So in terms of developing -- because that was another thing. What's in dispute? It's not in dispute that Badger owned the lot where the compound, or whatever, the structure where the Defendants were living was erected. It's also not disputed that Mr. Morton owned another piece of property and that ultimately it was discovered that the compound or the structure was erected on the wrong piece of property. It's not disputed that there was an effort to talk about or negotiate a land swap, as I read these submissions, and then ultimately that fell through and Mr. Badger wanted the Defendants off, as

evidenced by the eviction proceeding that was initiated in, I don't know, state magistrate court, probably, or maybe state district court.

So what, in terms of on the standing, what factually -- what record needs to be developed other than hearing from Badger?

MR. ROBERT: Well, for one thing, in looking at the Ruckman case, which is that Tenth Circuit case that you were referring to, the fellow in the cave on BLM land, there was never any real idea that that person was actually on land that he could make a claim to, certainly. And I think there is a really significant difference, and also in talking about the tents under the interchange, what distinguishes that, as well, is the fact that there were discussions between the Defendants and the Badgers about what to do about this. And for a significant period of time, there was an agreement. All right, you guys can stay there, there's no problem, let's work this out, let's try to figure out a way around it.

That's, I think, a large difference that society would look at as providing a basis for a reasonable expectation of privacy, because there they were, the mistake was discovered, and then the parties worked for a time, a significant time, I think, to try to resolve the mistake and what to do about it. And again, as you pointed out, these were undeveloped pieces of land. There were no structures on them,

until the Defendants built their home on the wrong one.

The fact that there was a sufferance by the Badgers, that they allowed them to stay pending resolution of the issue, is the significant difference, I think, between the Ruckman case and other cases in which somebody parked on land that didn't belong to them. In none of those cases, I think, was there any agreement between whoever it is that owned that land and the people that were there; okay, you can stay, let's figure this out. That, I think, is a large lever in favor of determining that standing exists. But I think it's impossible to know the nuances of that whole thing without hearing from the people that were involved in it.

And I think the fact -- there's a couple of things. One, yes, Mr. Badger at some point, after law enforcement got to him and said, look, these are terrorists, you need to get them off your land, he goes to court and he tries to get an order from the court, and the court says, no, and dismisses the case. The fact that the earlier agreement existed, I think, provides not only a support for the idea that there was a reasonable expectation of privacy, but also provided some due process and even property rights for the Defendants on that piece of land, until a court, a proper authority, told them, no, sorry, you're done, you've got to leave now. And that never happened.

THE COURT: In terms of the various submissions on

this, is the state court record of what -- I think it's been characterized as an eviction suit. Is that within the --

MR. CLARK: May I confer with my co-counsel?

THE COURT: Sure.

(A discussion was held off the record between Mr. Clark and Mr. Robert)

MR. ROBERT: There are documents that are in our possession that were not included in any of the -- in either the motion response or the reply, but they're available. They're a part of our vast body of information that we have.

THE COURT: Okay. Anything else --

MR. ROBERT: I don't think so, but I may --

THE COURT: -- before I hear from the United States?

MS. FOX-YOUNG: Your Honor, for Ms. Wahhaj, I'd like to make a few brief points.

THE COURT: Sure.

MR. ROBERT: I would finally point out that the fact that the Defendants made improvements on the property is also a factor of relevance.

MS. FOX-YOUNG: Thank you, Your Honor.

So the Defendants don't concede that the Badgers had a right to evict them, and I think where there is factual agreement is that an eviction never did take place. The cases bear out sort of a bright line rule, and the Court's inquiry can end there.

THE COURT: But see, I'm not -- in other words, I'm not seeing where there's a requirement that there be a court order of eviction. The fact that Mr. Badger initiated the eviction indicates he wants these people off his property. So at that point, then is there a reasonable expectation of privacy since the landowner wants -- in other words, at that point, I think legally, aren't they tress passers?

MS. FOX-YOUNG: No, Your Honor. And I think --

THE COURT: They didn't sign a lease. They didn't pay any kind of rent for this property.

MS. FOX-YOUNG: Well, Judge, it's not like Tanoan. I mean, if you go out to this earthship community, it's open land.

THE COURT: No, I understand.

MS. FOX-YOUNG: So going back to -- if the Court wants to go deeper beyond that sort of bright line rule and consider the subtilties, which is totally reasonable, and I think which Rakas supports -- I mean, the case is going back 20, 30 years, and the Supreme Court says, this is not an independent standing inquiry, you have to look at the whole Gestalt of is there an expectation of privacy. And to do that, Judge, we would put on in evidence --

THE COURT: Again, subjectively, I don't -- that's not at issue here. It's whether, again, that second factor that the Supreme Court talked about, that society is -- what is

it exactly? It's out of Smith v. Maryland. Whether the individual's subjective expectation -- I mean, I concede, and I think you all have established, there was a subjective expectation of privacy of the five Defendants there. But then you get to that second factor and whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

MS. FOX-YOUNG: And certainly I think the Court's inquiry is right on, Judge. And to further answer your question about what evidence we would put on, not only would we put on Mr. Badger's testimony, but the officers he talked to, all the documents in the case, whether it's an eviction case or trespassing case, those pleadings, maybe the County Court, the deeds, evidence of building and construction at the site, etc. You need the full panoply of information if you're going to make an inquiry about really what was reasonable.

You know, another case that I don't think was cited in the briefing, but the Court may consider, is United States v. Johnson, which is 584 F.3d 995. That's a 2009 Tenth Circuit case. That case talks about, you know, considering what social customs and norms are reasonable, and this is with guests in homes, the motel cases. I mean, it's all essentially the same analysis.

It shouldn't be forgotten or ignored that ultimately you're considering what is the aim of the exclusionary rule.

We're not only talking about these Defendants, but should police be able to go into any property that's the subject of a quiet title action or an eviction action. Does that really put --

THE COURT: Well, see, the title of the property isn't in dispute, as far as who's the legal owner, as I read these pleadings.

MS. FOX-YOUNG: Your Honor, we don't concede that. We don't concede that point.

THE COURT: You didn't put it in your reply, I guess. So it sounds to me like --

MS. FOX-YOUNG: Well, there's no evidence presented to the Court on that, but we don't --

THE COURT: But you've got the burden.

MS. FOX-YOUNG: Well, that's why we need to have an evidentiary hearing, Judge, so you can actually make factual findings with regard to whether -- and that's what we anticipated. We didn't know the Court would bifurcate, but we need an opportunity to give you the evidence as to ownership, as to the history of the development of that property, and what outsiders would see.

THE COURT: Well, fair enough. That's what I'm trying to figure out, then, in terms of development of this record. Like, for example, I've gathered this is in a remote part of Taos County, but I'm looking at Doc. 566-6, this is the

Consent to Search form, and it says Unit 2, Lot 28, Castillo Meadows Subdivision. Now obviously, as you said, this is not Tanoan, but how big are these lots? When you talk about erecting -- or making improvements, I've seen some pictures where there are spare tires. Certainly it wasn't done to code, if there are any codes that are applicable to this.

MS. FOX-YOUNG: It's the wild west out there, Judge. And that is important for your determination. It's very confusing. It's not even Placitas, where you go out and everything is flagged and posted. It's not uniform in that manner.

I think the Court needs to consider that, which is why there were these ongoing negotiations with the Badgers as to a swap. It's easily confused out there, and you need to hear that testimony and the evidence of that, because we posit that any reasonable person would think, yeah, you move to a place, you think you have ownership, you start building, and you learn that there's a mistake. This happens, you know. The technicalities of property law should not take center stage and eviscerate the Fourth Amendment right that these individuals have.

So that background of how these negotiations developed and were ongoing -- the Badgers did not take action for some time, legal action, and ultimately there was no eviction. And so we think this isn't like the car thief cases,

or the Johnson case I cited to you, Judge. That's a case where the defendant's girlfriend used a false identity to rent a storage unit. I mean, there was no fraud, there was no bad faith. These individuals went out, Mr. Morton acquired this property, and they built on it. These things happen. This is why we have this body of property law to suss it out.

But in terms of their expectation of privacy and what anybody would think was reasonable, they were building their home. And it was their home. You know, Mr. Robert cites in his reply Florida v. Jardines and that body of law. The Court still has to consider this under the umbrella of the fact that the home is sacrosanct. You know, this isn't an off-premises shed or a telephone booth. I mean, this is their home.

THE COURT: Right, but if you go back to the case -- is it Ruckman, the gentleman in the cave? Subjectively, that might have been his home. That's where he was living. So he satisfied that first prong. He didn't satisfy the second prong on whether he had a reasonable -- looking at it objectively, whether his expectation of privacy was reasonable.

MS. FOX-YOUNG: Sure, and I see that the Court is putting a lot of stock in the consent from Mr. Badger. But please consider that landowners, hotel owners, the BLM, the City, the rightful owner of a property -- and we don't concede that the Badgers are the rightful owners -- they can't consent. They can't override a one-night guest's expectation of privacy

and Fourth Amendment right in a property.

THE COURT: Right, but again, you mentioned the hotel context. If someone is staying past whatever time that they have paid for, to where they no longer have a right to be there, then I think there's some case law that says you don't have a reasonable expectation of privacy if you're not paying for the room.

MS. FOX-YOUNG: And if an eviction has been instituted, you know, and it's ten minutes later, yes, they can take you out, they can take your stuff out. But that's why it's so fact specific, Judge, and you've really got to hear the evidence rather than our proffer.

THE COURT: Then that's what we need to do. Who do we need -- you mentioned Mr. Badger. Again, since the Defendants have got to establish standing, I think you've got to make a factual record.

MS. FOX-YOUNG: Well, does the Court anticipate bifurcating that evidentiary hearing?

THE COURT: Yes. I mean, to the extent that there's law enforcement officers communicating with Mr. Badger. I mean I think that's -- I want the record developed. Because if there's not standing, then you don't get to anything else.

MS. FOX-YOUNG: We agree, Judge. We just want to put the evidence on so that you can make those findings.

THE COURT: Okay. Anybody else before I hear from

the United States?

MR. RAY: Judge, if you wouldn't mind.

THE COURT: Sure, go ahead.

MR. RAY: Because I appreciate that you are trying to get past this subjective expectation of privacy and to an objective one, and since we're going to take evidence on that and have the opportunity to develop the record, which we appreciate, I do want to put something else out there for the Court to consider as a distinction from being in a BLM cave or being a homeless person that sets up a tent under the bridge.

Your Honor, under New Mexico state law, there's a regime called the Uniform Residential Relations Act, and it's a statutory scheme that's under NMSA 47-8-1 through -- I think there's about 40 sections. It's going to lay out and provide a lot of the parameters of the relationship between what is a landlord and a tenant, and what constitutes a landlord and a tenant.

Our contention is also, Judge, that there are situations where someone suffers -- and I believe that's what Mr. Robert was trying to articulate, but I wanted to kind of put it out there more explicitly. That when someone suffers another to be on their property, living there, even if there isn't necessarily a written lease, the surrounding facts can create a tenancy that cannot be unilaterally exterminated without the judicial processes that are outlined in the Uniform

Residential Relations Act.

Judge, it's something that -- you know, I come from western New Mexico, a rural area, Ramah, New Mexico, which unfortunately this Court sees a lot of cases originating out of there. But in my home town of Ramah, there are constantly quiet title suits pending because there's disputes between property lines and whether this lot was the correct one that this house was supposed to be built on. And people don't -- it would be kind of strange to think that people lose their expectation of privacy because a legal dispute arises about whether they should be there.

It's true, you're talking about title issues, but all I'm trying to focus in on is that while they're having a -- what the record will develop in the evidentiary hearing, I believe, is that while they're having this discussion about swapping titles and trying to remedy the situation with where they have erected their homes, that they're being permitted to live there and some sort of a tenancy is created. That's why, Your Honor, you have this case that's filed in magistrate court. It's Case No. M-53-CV-2018-00076. This was what's called a Petition for Writ of Restitution, which is the procedure that you go through to try to evict a tenant. And as has been proffered by counsel, the judge in that case, Judge Ernest Ortega, filed a motion that dismissed it with prejudice on June 27, 2018.

So those are things that I think justify Your Honor permitting an evidentiary hearing, keeping in mind the significant distinctions that you're going to see between this and squatting in a BLM cave. And that's just all I wanted to say.

THE COURT: All right, I understand.

MR. RAY: I appreciate that, Judge.

THE COURT: Anybody else from the defense?

Mr. Hall.

MR. HALL: Thank you, Your Honor.

So I think the Court has zeroed in correctly right to where we need to be in terms of standing, the second prong, being whether something is an expectation of privacy that society would be prepared to recognize as legitimate. But this case is not an edge case, it is not a difficult case, it is squarely within all of the case law that the United States cited in its brief.

There's some minimization going on, understandably, because factually from that perspective, you would want to try to make this case seem not like those cases. But this case is actually exactly like some of the other cases. The cave case isn't even really the best case. The cave case, Ruckman, is a good case, but all of the other cases that the Government cited have a couple of things in common.

First of all, whether the property, or whether the

place that the person who doesn't have standing is trying to raise a Fourth Amendment claim over is their home is not dispositive, and actually, every single case that the United States cited dealt with this. I think every single one. Maybe hotel rooms wouldn't be considered a home, even though the people there were actually living there, so I would argue it does. So not just the cave.

If you look at the Bishop Estate case, Zimmerman, out of California, there's a lot of similarities there. The folks in that case were squatters that had shown up on to another person's property. They improved and built a shack or a structure to live in. They had negotiations with the property owners to stay there and to be the caretakers of the property, which were rejected by the property owners. They were there for seven months before the eventual arrest of these defendants.

In that case, the Ninth Circuit said, it doesn't matter if you built property, it doesn't matter if you improved and built something to live in, if you don't have a righteous claim, a legal claim to the property, you don't have standing. And in that case, they were told by the property owners, you're trespassing, and they stayed. They were told again, you're trespassing, and they stayed, and so then a police officer came with the owners and removed them, and then eventually it gets to the Ninth Circuit about a wrongful -- I think that was a pro

se claim by Zimmerman, who was a guest of the squatters. But his rights were just as nonreasonable, in terms of standing, as the actual squatters. That's how the Ninth Circuit came out there.

The Johnson case that was referenced, we did talk about that case in here, and I would urge the Court to look closely at the Johnson case, as well, because what's interesting about the Johnson case is that the Court there looked to property law. And it was also interesting that defense counsel kept referencing property law. That's how the Johnson case actually looked at it, because the Court said and the Tenth Circuit said that in order to determine if an expectation of privacy is reasonable, you have to look at all these factors. And you have to ground it in something. So you have to ground it in either societal norms, or you ground it into something that we recognize as already reasonable, which would be the law. And in that case of property law, the Court mentioned the right to eject someone who is using your property.

In that case, it was a storage unit, but the Court went out of its way to recognize how high an expectation of privacy subjectively would be in a storage unit, locked. But it was a storage unit that someone had rented in the name of an identity theft victim. So they stole the ID of someone and opened it in their name. And the Court thought two things in

that analysis.

The Court said, first of all, when someone illegally occupies someone else's property, they essentially take the property right of that person, which includes the right to eject away from them. And secondly, the Court noted that in that case, when the renting of the storage unit was done fraudulently, that was harm. That was a crime. That was a harm done to the real person, who would have had standing to object to a search of their storage unit, because he stole their identity.

In this case, it's the same deal. First of all, the Defendants living and improving and building upon someone else's property, Jason Badger's property, and then not leaving when they were told by Jason Badger and had the idea they were on the wrong property, again, they took away Jason Badger's property rights to the exclusion of others from his property. So they had violated that property right.

As then, B, like the Court said, they were trespassers. They were trespassers, which like identify theft, maybe not as serious on the scale of crimes, but is a crime, and it harms the property owner.

So again, the Court in Johnson said it could not recognize an expectation of privacy that society would deem reasonable in that sort of situation because it would make the Court party to the fraud, and this would be the same situation

here. Recognizing a reasonable expectation of privacy by essentially an armed group who comes and takes over your property and then doesn't leave would be recognizing, and then the Court would be participating in the trespass. And I think it's pretty obvious that society would not be in a position to recognize as reasonable or legitimate the armed takeover of someone else's property as long as you get to live there long enough.

And the truth is, Jason Badger -- you know, these are in the reports that are attached to the Motion to Suppress, the Taos County Sheriff's Report by Jason Rael and others, and then also attached to our motion and response, in terms of the consent. But Jason Badger didn't, you know, suffer the Defendants to be on his property. He wanted them gone as soon as he found out that Mr. Wahhaj was wanted out of Georgia and that the missing child was there. And he knew that, because he had seen them when they first showed up at his property. So he, on his own, was trying to eject them from his property. He went to law enforcement. He initiated, basically, all of this.

In fact, he is one of the reasons why law enforcement even learned where the group was, because until that, they didn't actually know specifically where in Taos County they were. So law enforcement did not encourage or do anything to change Jason Badger's mind. The property owner wanted them gone as soon as he learned who they were.

Now, in terms of the question as to whether Jason Badger was the rightful owner and whether this is going to be contested, Your Honor -- well, I'll just hand these exhibits in. These were actually attached to Lucas Morton's pro se Motion to Dismiss that was filed, I think in November, and then again in December. But we are going to just go ahead and submit them here.

THE COURT: They were originally submitted under Doc. 565, correct?

MR. HALL: Correct.

THE COURT: Page 10 of 14?

MR. HALL: Yes, Your Honor, that's right. They were an attachment to the supplement motion that Mr. Morton filed.

MS. FOX-YOUNG: Your Honor, just for the record, we object to the foundation, because we need to have a hearing on it.

THE COURT: Well, I can take -- it's a document in the record. I mean, I'm not going to decide the issue today, but I can take judicial notice of what the parties have filed in this case.

MS. FOX-YOUNG: Yes, Your Honor.

THE COURT: Okay. So that's what I'm going to do, I'll take judicial notice of Doc. 565, Page 10 of 14, and then Page 11 of 14. Go ahead.

MR. HALL: Yes, Your Honor. And to be clear, this

document has markings on it to show that it was actually filed in Taos County and it's an official record. So the foundation sort of speaks for itself. But since we're at a hearing here, the point of offering this is just to show that Jason Badger did, in fact, have the warranty deed transferred to him in October of 2017 by the previous owner.

And then separately to that, Your Honor, similar -- and I apologize for the markings on the bottom. We started with Government's Exhibit 3. This is marked Government's Exhibit 2. Probably should have waited before marking the numbers. But this one is the actual lawsuit that was filed and served on Lucas Morton. Again, you can see the markings on there that it was filed in Taos County Magistrate Court.

The reason that the lawsuit was dismissed was that it was filed in the wrong court. So I understand that the Judge may want to hear from Jason Badger on that, and the United States is fine with that, but I would submit that we do not need any more evidentiary hearing at this point because the law is so clear.

And I do want to just point out the Kafuku case. I'm not going to try to say the whole thing, but the Kafuku case out of the District of Utah. It covers kind of all of these arguments, in addition to the Zimmerman v. Bishop Estate case and all the other cases, really. But this Kafuku case covers all of these things, because in that case, again, the person

was living in an apartment. It really was his home. And the Court summed it up about as good.

So two things about that case. First of all, it makes clear -- this is from 2018, and I think it's probably the most recent case that we have. It's a District case from the Tenth Circuit, so it's not exactly binding, but it does take into account all these other cases that we are citing. They all start with this Amezquita case from the First Circuit in 1975, and then as courts considered these cases. So I think the Kafuku case kind of takes all that case law into consideration as it goes through, and there's a couple of really important things about Kafuku.

First, the Court actually found in that case that the warrant was invalid and that the good faith exception didn't save it. So essentially, the Motion to Suppress in a criminal case would have been granted, but the Court found that the defendant did not have standing, so it denied the motion. So again, we get to the idea that there's no, as the Court mentioned, there's no reason to go forward on this motion now that it's been bifurcated, which was a smart move, because there's no reason to go forward with the rest of the consideration of the warrant if there's no standing.

Another important thing about Kafuku is that it made clear, after looking at all of these other cases coming before it, that there's no, as I said, there's no talismanic test,

meaning there's no eviction requirement, or eviction judgment required. And I believe in none of the cases that were cited by the Government was an eviction judgment ever actually obtained, except for in the Carr case -- no, the Curlin, the Curlin case. That was the only one where an actual eviction order was obtained, and that was only relevant there because that person was living as a tenant, paying rent in a leased apartment. So he was there legally for a long period of time, and then he stopped paying rent, and then he did not vacate.

So the Court was looking, again, at the totality of the circumstances, and one thing to note there was that an eviction judgment was obtained. But that would make sense in that case, because the person was a legal occupant of the property leading up to that point.

In the Gale case out of the D.C. Circuit, it mentioned similarly that paying rent going forward -- paying rent at some point in the past doesn't mean at the time of the search that you had standing. So in this case, even if there was an agreement with the Defendants and Mr. Badger, or discussions, even if they had paid rent, even if they had signed a lease to occupy that property in April of 2018, it doesn't matter, because by May of 2018 and certainly by August of 2018, there's no more reasonable expectation of privacy that society would recognize as reasonable because Mr. Badger had made clear that he was trying to get them off of his property.

And then finally, from Kafuku, there's a quote I just want to highlight from there: "Society is not prepared to recognize as reasonable the expectation of privacy of an individual who unlawfully occupies a piece of property regardless of whether it's the person's home." And I think that sums up, basically, what we're doing here, the reasonableness of being on someone else's property illegally, not leaving, and whether society would recognize that as something that we want to uphold and view as reasonable.

Again, someone who -- Mr. Badger had wanted them off his property earlier. He tried everything he could. He tried a lawsuit, but filed it in the wrong court. He then was told by law enforcement, and this is in the statements from the Sheriff's Department of Taos County, he basically was told to stop going near them, let them alone, because it was dangerous. There was lots of shooting going on, there was known to be armed people on that property.

So what we're talking about is an armed takeover of this person's property. He's being prevented from doing more than what he already did, which was everything he could do under his power to get them off. There's just no way that society would recognize that as reasonable. And if that's the case, there's no reason to have an evidentiary hearing, because we know that those facts really shouldn't be in dispute. We know Jason Badger was the owner.

That being said, if the Court does want to hear from Jason Badger, I think the United States would be more than happy to make sure that --

THE COURT: Well, it's not so much -- I mean, would you agree, first, the Defendants have the burden of establishing standing?

MR. HALL: Yes, sir. That's another point, yes, sir.

THE COURT: And as I understand it, would you agree it's a preponderance of the evidence standard?

MR. HALL: Yes, I would agree, Your Honor.

THE COURT: Now, again, I thought Ms. Fox-Young aptly made the point that we're not talking about lots in Tanoan. So this is a remote area of Taos County, but it did, like on the consent, it referenced a lot of a subdivision. So that suggests some kind of plat of something.

MR. HALL: Absolutely.

THE COURT: Do you know?

MR. HALL: So I know that they exchanged, when they were going through the process, the Badgers and Mr. Morton, they were -- and I believe Mr. Badger even showed one of the older sons at the property, when he first realized this, when he first went out to his property and he saw that there were people there and they were building things, he had a map and he showed them, this is the wrong property. And I think there's no dispute about that. That's why they were looking to

exchange. And the lots were 28 and 29 in this Costilla Meadows Subdivision.

But another point, too, in terms of whether something is reasonable and whether society would recognize it as reasonable, a person's property rights don't change because you live in Tanoan or you have property out in a remote area. It's a subdivision. It's got boundaries. It's recorded. He has the deed. His property rights are his property rights, it doesn't change because he doesn't live in Tanoan. So the expectation of privacy, based on reasonableness, doesn't change, either. It's the same.

THE COURT: Now, in terms of the Government -- again, on a suppression hearing, we're talking about a preponderance of the evidence standard. I don't believe -- the rules of evidence typically don't apply. As far as what the Government, in other words, what you've submitted, I can take judicial notice of it. I'll take judicial notice of the file stampings of the Taos County Clerk. Also, the document number in which it was filed in this case. Is there any -- and you cited the case law, I believe, in your response. In terms of the record that the United States has developed, is there anything more that you wish to submit on this?

MR. HALL: So if we were to have a hearing --

THE COURT: Because next I'm going to ask what they want to do.

MR. HALL: Sure. At this point, I would say, no. I think that the law is absolutely clear, and the facts, the undisputed facts, and even the disputed facts, they're essentially quibbles about whether this case is exactly like some of the other cases in the case law.

I think as our brief shows, and if you really dig into the cases, the quibbles are, they were building a home, the home is sacrosanct. That's been rejected by all these cases, Kafuku most recently and very bluntly. And whether they were having some discussions or maybe they had been there in some way at the sufferings of the property owner at some point, again, the case law makes clear -- we can quibble about that fact, but by August, there should be no dispute that the property owner didn't want them there.

So at this point, there's nothing that we would really need to put forward, we don't think, but if we did have witnesses, what we would have is Jason Badger. He would talk about why his lawsuit was dismissed for being filed in the wrong court, not because he changed his mind. We would talk about him texting Lucas Morton and saying, this is the time-line that you need to get off the property, which didn't happen. Talking about how law enforcement basically told him to stop going, not have a confrontation, that they're armed and they may be dangerous.

So those sorts of things which I've proffered here

would be what we would bring out, but all that would really do is bolster the already clear point, which is they didn't have an expectation of privacy that society would view as legitimate or reasonable, because the real property owner had made that clear and the case law is clear.

THE COURT: Let me ask either Mr. Ray or Ms. Fox-Young, do you want to -- I think at this point -- I mean, you did a reply to the Government, but I think there needs to be additional briefing where you set forth the facts in your pleading that support this. And then I guess my question at this point is, since it's Defendants' burden, what evidence at an evidentiary hearing do you want to present?

Actually, do you all want to confer a minute and I'll step out?

MS. FOX-YOUNG: If we could, that would be helpful.

THE COURT: And would it be easier, so you all could talk, if the United States leaves?

MS. FOX-YOUNG: Yes, Your Honor.

THE COURT: Would you all mind doing that? So let's go ahead and take about a 15-minute break, and then I'll come back.

And what I'd like is to know from defense counsel and Defendants what you want to do in terms of obviously some kind of a supplemental briefing where you go through your factual narrative and the legal authorities, and then the Government

would be able to respond to it. But also, what you want in the form of an evidentiary hearing.

All right, we'll take a break.

(Recess was held at 11:07 A.M.)

(In Open Court at 11:35 A.M.)

THE COURT: Ms. Fox-Young.

MS. FOX-YOUNG: Thank you, Your Honor. I'm prepared to address the Court's question from before the break.

It would be our strong preference, and we think it would be far more efficient, if the Court would proceed to let us put on evidence, and I'm going to describe for the Court the areas in which we think it's really critical that you make findings, Judge.

First, with respect to Mr. Morton's possessory interest, and he had one, there was no judicial determination on that. We have looked at the case docket. I mean, the Government has been testifying and putting on all this hearsay as to what happened. Well, the Court's got to look at it.

The case was dismissed for lack of prosecution on June 27, 2018. I don't know if Mr. Badger didn't show up to court or what happened, but the Court's got to look at all those pleadings and the history in that case and what happened, and then it has to make a determination about the evidentiary value of that and what it all means.

There's also, Judge, in this exhibit the Government

drew to your attention, this petition by owner for restitution and the attached termination agreement, there's reference to this contract between Mr. Morton and the Badgers, and there's a whole bunch of evidence related to that, Judge, because it was entered, and it was apparently terminated. There is somebody on this termination. We don't have the agreement, itself, okay, in evidence, but the Court needs to consider it.

Christopher John Stachura, Esquire, this lawyer, terminated it. We don't know if it was terminated O properly, or what the effect was of the termination under New Mexico law, and that, Judge, is where we're going to need to make argument for the Court as to the effect of New Mexico law. Did a tenancy remain? What is the effect of the Owner-Resident Relations Act on all of this? You've got to consider that. And we acknowledge that we need to provide the Court with that legal authority.

In terms of witnesses, Judge, with respect to all these events, we need to put on Mr. Badger. It's our burden, we'll put him on. This is a witness who will not talk to us. We have to Subpoena him under the compulsory process. We've got to bring him here. The officers he talked to --

THE COURT: Let me ask just one question. Is he in New Mexico, or is he in Taos County?

MS. FOX-YOUNG: He was at the time that Mr. Villa talked to him, which was -- I don't have anything recent -- in

2019. We presume that he is, but I can't tell the Court --

THE COURT: In other words, if he were out of state, what's your position there?

MS. FOX-YOUNG: We need to bring him. We'll have to address --

THE COURT: In other words, if he's out of state and he gets served with a Subpoena and wants to do this by Zoom, I guess I'm trying to get a sense of --

MS. FOX-YOUNG: Well, we'll be flexible to get it done. We'd like to have him here, and I think he is in state. And it sounds like the Government is going to facilitate getting him here, so I think that shouldn't be an issue.

THE COURT: Okay.

MS. FOX-YOUNG: We've got to put on the escrow agent, the title agent, the officers who talked to him. And Judge, you pointed out something really important, and clearly you've looked closely at the record that's been provided to you. But that pile of tires out there on the property, that's the result of the Sheriff's Department bulldozing the property two days prior. We've got to show you video of the inside of the house. We have to show you the improvements that were made. We need to show you the aerial photography. We need to show you what it looks like out there and what a reasonable person, what any member of society would think is reasonable in terms of drawing conclusions about where property lines are, etc.

So all of the evidence as to the ongoing conversations between the Badgers and Mr. Morton, that all needs to come in, and Mr. Morton, certainly, needs to be available and will be available to testify, you know, to rebut any response from the Government. There are going to be, we think, disputed facts as to the understanding of what the agreement between those parties provided and where they were all left.

So we would like, Judge, to have a day to put on evidence and to make oral argument and to brief you, as necessary. But we think the briefing should come after we put on the evidence so it can be tailored and we can make this process efficient for the Court.

THE COURT: One of the things that's going to help, then, is requested findings, and I'd like that in -- I mean, I will let you supplement, but I'd like them in advance so at least I've got a roadmap of where you want to go in terms of your evidentiary proceedings.

MS. FOX-YOUNG: Okay. You know, you can also put us on a tight leash to do it really close to the hearing, and we can be prepared to do that. But I think we're going to have to supplement and modify if we do it in advance, because many of these witnesses won't talk to us.

THE COURT: Well, no, and I understand that. I think -- I would ask this. To the extent the Government can

facilitate getting Mr. Badger here, that would help smooth things along.

In terms of -- why do you need somebody from the title company?

MS. FOX-YOUNG: Well, there are questions about the termination of this agreement, the real estate sale and purchase agreement. There are a lot of unknowns there. We need to recover all those documents, and we need somebody who can put them on.

We need somebody, Judge, to testify as to where the building was that the Sheriff's Office decimated. Was it even on the property described in this deed? So we will tailor it, we will make it as efficient as we can, but I think we need a day, Judge.

THE COURT: No, I think that's reasonable. What I would suggest is we do something, like, we pick a day where then the following morning -- in other words, if we need to spill over, then we go the very next day, too.

MS. FOX-YOUNG: Well, we were hoping to chopper you up there in a helicopter the following morning so we could actually make a site visit, but we'll be flexible.

THE COURT: Okay. Do you have a sense of when you would be ready to do the hearing?

MS. FOX-YOUNG: Let me confer really quickly.

Judge, we know that you have a tough trial schedule,

so I guess if we could get ahead of your April --

THE COURT: That's what I would like. Maybe Mr. Garcia can pull up some dates. What's the earliest you'd want to do it? In other words, is this a situation where you're going to take the lead, Ms. Fox-Young, and then others would either join in and supplement whatever you submit?

MS. FOX-YOUNG: We might divide up the subject matter. We'll need to work that out. I think all the teams are going to have areas to contribute in. And of course, Mr. Morton is representing himself, and I don't want to speak for him, but we'll figure out a way to put it on without duplication for the Court.

THE COURT: Okay.

MS. FOX-YOUNG: I think 30 days would be the earliest. The first week in March, I mean. Three to four weeks from now is about the earliest we could probably get witnesses subpoenaed.

And Judge, I don't know how many people here have tiny kids. I have little kids, and I'm taking them to Carlsbad Caverns the 19th to the 24th. I know that's sort of everybody's spring break, and so a lot of us have to do child care that week.

THE COURT: Sure.

(A discussion was held off the record.)

THE COURT: I've got the 7th of March and the 9th

of March open. The thing about March the 9th is, we'd have to finish that day because I'm not available the 10th.

MS. FOX-YOUNG: Looks like we can do either for the defense, the Court's preference.

MR. HALL: So to just throw a little wrench in there, I will be on military orders until March 10th, from the end of February until March 10th, so I would not be -- and Kraehe would still be on military orders. So it'd be preferable --

THE COURT: Okay.

MS. FOX-YOUNG: Well, they just had a trial vacated for --

MR. HALL: That's next week.

MS. FOX-YOUNG: Oh, that's next week?

THE COURT: All right, then the next available dates would be Monday and Tuesday, March 27 and March 28.

MR. CLARK: Judge, I've got a murder trial in Carlsbad going for sure. I guess counsel can stand in for me, if that's okay.

THE COURT: Would that be okay, Mr. Robert?

MR. ROBERT: Yes, Your Honor.

THE COURT: Okay.

MS. FOX-YOUNG: Yes, Judge, for the defense, we're okay.

THE COURT: Why don't we do this. Just in terms of getting ready for this, let's say Tuesday, March the 28th. Do

you want to start at 9:00?

MS. FOX-YOUNG: Sure.

THE COURT: Okay. And then if we need to spill over, we can spill over into the morning of the 29th.

MS. FOX-YOUNG: Thank you, Your Honor.

THE COURT: And then in terms of the requested -- I think the easiest thing to do, in terms of requested findings and conclusions, is just have both sides submit them at the same time. When would you propose that they be submitted?

MS. FOX-YOUNG: Your Honor, seven days prior.

THE COURT: Yes, that's -- does that work? Okay. So seven days before this. So the Tuesday before, the close of business Tuesday the 21st, the parties submit requested findings of fact and conclusions of law.

And in terms of -- you mentioned possibly people from the title company. If it's just -- I mean, witnesses that aren't major fact witnesses, if it's convenient for them to do it by Zoom, that may make a little sense.

MS. FOX-YOUNG: Sure. And Judge, we'll seek stipulations where we can.

THE COURT: Yes, that's true, stipulations would be -- and then, other than as a major fact witness, is there anybody else besides Mr. Badger?

MS. FOX-YOUNG: The officers who interviewed Mr. Badger, certainly, and I don't know if that's two or three.

THE COURT: Okay. Are they Taos County Sheriff's deputies?

MS. FOX-YOUNG: Yes, they all are.

THE COURT: Okay. Then we'll go ahead and get a notice out on that.

Mr. Hall.

MR. HALL: Your Honor, just to add, Mr. Badger is out of state. He's in Texas. We had spoken to him about possibly being available today for Zoom, but he works construction, so it's really hard for him to just take a bunch of time off. So I know he would prefer to do it by Zoom, if that works. But, yes, he's in Texas. And I'm not sure about the Taos County officers, if they're still employed.

THE COURT: If you could provide that information -- I guess you'll have to make a call. I mean, if you Subpoena him, then we'll see what happens.

MS. FOX-YOUNG: Yeah, if the Government can work with us on giving us his contact information, we'll figure out the best way to do it.

THE COURT: Well, I'll say this. I think it's important for both sides to have the factual record developed.

So with that, we've got a date for the evidentiary hearing. There's going to be requested findings and conclusions submitted. Is there anything else that we need to take up today?

MR. HALL: Your Honor, I just wanted to call your attention -- there was reference to this property agreement, the contract. That's in the record, too. It's in the same exact filing, 565, by Mr. Morton, so it's there.

THE COURT: Okay.

MR. HALL: I have it here, but it would probably be easier to just pull it up from the --

THE COURT: And I would say this in terms of, like, foundational. If a document has the stamp on it, it's not -- to me, in a suppression hearing, it's not laying like a foundation that you would for admission in a jury trial.

All right, from Defendants' perspective, is there anything else that we need to take up today, that you want to raise?

MS. FOX-YOUNG: Not for Ms. Subbhanah Wahhaj, Your Honor.

MR. CLARK: Not for Siraj Wahhaj, Your Honor.

MR. RAY: Not for Hujrah Wahhaj, Your Honor.

MR. ELSENHEIMER: Not for Ms. Leveille.

MR. SHATTUCK: Not for Mr. Morton.

THE COURT: Okay. And not from the United States? All right. Then we'll be in recess, and that will conclude this hearing. Thank you.

(Proceedings adjourned at 11:50 A.M.)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	
vs.	No. 1:18-CR-02945-WJ
JANY LEVEILLE, SIRAJ IBN WAHHAJ, HUJRAH WAHHAJ, SUBHANAH WAHHAJ, and LUCAS MORTON, Defendants.	HEARING re: STANDING

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Mary K. Loughran, CRR, RPR, New Mexico CCR #65, Federal Realtime Official Court Reporter, in and for the United States District Court for the District of New Mexico, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter on Thursday, February 9, 2023, and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 16th day of June, 2023.

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